Filed 3/15/10 P. v. Williams CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEON DWAYNE WILLIAMS, Defendant and Appellant.	B208410 (Los Angeles County Super. Ct. No. YA067656)

APPEAL from a Judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed as modified.

Frank Duncan, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Beverly Falk, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals his conviction of four counts of attempted willful, deliberate and premeditated first degree murder (Pen. Code, §§ 187, 664) and one count of firing into an occupied vehicle (Pen. Code, § 246), with true findings on the attempted first degree murder counts that he personally used a firearm (Pen. Code, § 12022.53, subds. (b)-(d)) and on all counts that the offenses were committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)). He contends insufficient evidence supports his conviction; the court erred in admitting prejudicial gang photographs; defense counsel was ineffective for failing to object to suggestive identification procedures; the court erred in the giving of accomplice instructions; and cumulative error mandates reversal. We modify the judgment to correct an illegal sentence and otherwise affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Shooting.

On February 4, 2007, at about 1:00 a.m., shooting victims Corey Boyette, Byron Wilson, and Jeremiah Farmer were riding in Byron Wilson's car, a Buick with tinted windows. Boyette was driving, Farmer was in the rear passenger seat, and Wilson sat behind the driver. Corey Reitzell, who had been drinking heavily, was riding in another car with two other people. Reitzell got out of the car to urinate on the sidewalk, walked over to Wilson's stopped Buick, and got in.

Defendant, a member of the Crips Harlem 30's gang, lived at Athens Gardens apartment complex. Defendant, who was with Johnica Brown, his girlfriend, drove up as Reitzell was getting into Wilson's Buick.[1] The two cars were facing in opposite directions, and almost next to each other. Defendant asked Brown who was in the other car, and Brown told him she did not know. Defendant got out of the car with a .40 caliber Glock.

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[1] Brown, who was initially charged with four counts of premeditated attempted murder, testified in exchange for being allowed to plead guilty to being an accessory after the fact and receiving a term of two years in state prison. She admitted at trial that she lied when she first spoke to Detective Valento about the crime.

Reitzell and Wilson saw defendant approach with a large black gun that looked like a .40 caliber Glock.[2] Reitzell heard defendant say, "Harlem 30," which Reitzell knew was a gang in South Central Los Angeles. Brown heard defendant say, "Westside Harlem 30 Crip." Defendant stepped between the two cars towards the rear of Wilson's car, and Reitzell told his friends defendant had a gun and they should drive away. Defendant fired approximately seven shots at the car, and Boyette drove away. The car crashed into a wall about a block away. Brown saw the crash through her mirror. Defendant got back into the car and ordered her to drive away.

Boyette was shot four times, and at the time of trial, was in a wheelchair and unable to walk. Reitzell was not shot, but was knocked unconscious by the crash and hospitalized for several days. Farmer and Wilson suffered gunshot injuries.

Sheriff's deputies responded to the crash scene at Budlong Avenue and Imperial Highway. They recovered six .40 caliber shell casings from a Glock semiautomatic. The jaws of life were required to free the driver from the wreck. The car was full of bullet holes; at least six shots were fired at the car. Forensic examination of the car disclosed the shooter was close to the car when he fired the gun.

2. The Identifications.

Sheriff's Detective Michael Valento testified as a gang expert that defendant and his brother belonged to the Harlem 30's gang. Detective Valento prepared the six-pack photo array used to identify defendant based upon a description that the suspect was a light-skinned black, tall and skinny, and a member of the Harlem 30's gang who lived at Athens Gardens. In the array, defendant was the only person wearing orange jail garb.

Reitzell spoke with Detective Valento at the hospital.[3] Reitzell had never seen defendant prior to the shooting, and testified the man who shot at him had a short Afro. He identified defendant from the photo array, picking two pictures, and indicating on

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2. Reitzell identified defendant at trial. Wilson identified defendant at trial, and stated his hair was styled in a "little Afro."

3 Reitzell had an eight-year-old conviction for possession of marijuana with intent to sell, and was jailed for 363 days and placed on probation.

defendant's picture that his certainty was "eight out of ten." Reitzell told Detective Valento that the hair in the two photographs he identified as the shooter were not the same hairstyle as the shooter's hair. Reitzell did not pay attention to defendant's clothing in choosing the photograph of defendant, and did not know what an orange jail uniform looked like.

Wilson identified defendant from the six-pack photographic array, and he rated his identification at "seven out of ten." He was admonished prior to viewing the arrays that defendant might not be pictured in them. At the hospital, Farmer identified two pictures in the array as the shooter, and rated defendant's picture as "eight out of ten." However, on the witness stand, Farmer denied any recollection of his identification.

3. Gang Expert Testimony.

Detective Valento testified the Harlem 30's are a criminal street gang with over 700 members. Their gang hand sign is three fingers held up, or a nine made with the fingers of one hand. The primary activities of the gang are firearm assaults, burglaries, and narcotics sales. Defendant admitted to Detective Valento that he was a member of the Harlem 30's.

Detective Valento testified that when a gang member shoots individuals and attributes the shooting to the gang, the shooting instills fear and intimidation in the community and upholds the violent reputation of the gang. A shooting would increase defendant's status in the gang. When witnesses do not want to come to court, people avoid subpoenas, and witnesses deny they have seen gang members with guns, the gang can perpetrate crimes.

Defendant did not put on a defense. The jury found defendant guilty on four counts of attempted willful, deliberate premeditated murder, with true findings on the firearm and gang enhancement allegations as to those counts, and found him guilty of one count of shooting into an occupied vehicle, with a true finding that the offense was committed for the benefit of a criminal street gang. The court sentenced him to 260 years to life, consisting of four consecutive terms of 65 years to life on the four attempted murder counts (four consecutive 25 years to life sentences on counts 1 through 4, plus 25

years to life on each count for the firearm enhancement, plus 10 years on each count for the gang enhancement, plus five years on each count for prior convictions). The court sentenced him to a concurrent term on count 5, and struck the remaining enhancements.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE.

Defendant contends the evidence is insufficient to uphold his conviction because the prosecution failed to establish he was the perpetrator of the shooting beyond a reasonable doubt. (*People v. West* (1983) 139 Cal.App.3d 606, 609.)

Defendant points to inconsistencies and credibility issues with all of the prosecution's identification witnesses, noting that one of Johnica Brown's two statements to the police was coerced, and the jury was left to determine which was true. He also argued that it was not reasonable for the jury to believe Brown's coerced testimony because she initially testified she knew nothing at all about the shooting. Brown was the only witness to testify that she heard defendant use the words "Westside" or "Crips." Brown was the only witness to testify that defendant walked around the car in a certain direction when he got out; all the other witnesses testified he went 180 degrees in another direction.

Wilson at first claimed at trial that he was not intoxicated the night of the shooting, but when impeached with his preliminary hearing testimony, admitted that he drank a fifth of cognac between 1:00 a.m. and 1:45 a.m. When viewing the six-pack photographic array, Wilson was only certain that defendant was the shooter to a 70 percent certainty.

Farmer identified defendant as the shooter only to a 70 to 80 percent certainty. He did not see the gun fired.

Reitzell was intoxicated the night of the shooting; described defendant's hair as a "short Afro," although defendant did not wear an Afro, but a "fade"; his description of the shooter's clothing did not match Brown's description; he identified two persons from

the six pack as being the shooter, and was only 80 percent sure of defendant's identification.

Defendant also points to numerous inconsistencies in the evidence, including that Brown's description of defendant's clothing differed from the victims' descriptions; Brown made a plea deal in exchange for her testimony; the victims had been drinking heavily and only had a short time to observe defendant; and defendant was the only person in an orange jail jumpsuit in the photographic array.

In reviewing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether there is evidence that is reasonable, credible and of solid value such that the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) We do not reweigh the evidence or revaluate a witness's credibility. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 200.)

Here, there was substantial evidence to support the jury's conclusion that defendant was the perpetrator: Brown, Wilson and Reitzell all identified defendant as the shooter. Both victims Wilson and Reitzell identified defendant independently in the photographic array with a high degree of certainty, and Brown, defendant's girlfriend, identified him.

II. GANG PHOTOGRAPHS.

Defendant argues that the admission of photographs at trial to establish he was a gang member was prejudicial error because there were too many photographs; they showed that his father was a gang member, which permitted the inference defendant came from a "bad" family; and the date of the photographs was unknown.

A. Factual Background.

Detectives obtained approximately 40 photographs from defendant's apartment showing defendant's tattoos, and defendant holding a gun and displaying gang signs. Defendant objected to the admission of 14 of these photographs at trial. Those photographs showed Harlem 30's tattoos on defendant's arm and stomach, and defendant displaying Harlem 30's gang signs and wearing clothing associated with the gang. They

also showed defendant's father to be a gang member. The court ordered the photographs showing a weapon cropped to hide the gun, finding that aside from the photographs containing defendant with a gun, there was no prejudice. On the other hand, the court noted that the photographs were relevant to show defendant's affiliation with a street gang. The court asked the jury members after they were shown the photographs whether they could be fair to both sides, and no member indicated he or she could not.

B. Discussion.

The court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code, § 352.) The prejudice referred to in Evidence Code section 352 is evidence which tends uniquely to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) We review the admission and exclusion of evidence on relevance and Evidence Code section 352 grounds for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1198.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Gang evidence is admissible if it is relevant to some material issue in the case (other than character evidence), is not more prejudicial than probative, and is not cumulative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) "Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) However, gang evidence is inadmissible if introduced only to establish defendant's criminal disposition or bad character as a means of raising an inference the defendant committed the charged offense. (*People v. Avitia, supra*, 127 Cal.App.4th at p. 192.) In such instances where gang evidence is only tangentially relevant, given its inflammatory potential, it should not be admitted. (*People v. Albarran, supra*, 149 Cal.App.4th at p. 223.)

Here, the photographs were relevant to the allegations that defendant committed the offenses for the benefit of a criminal street gang, the Harlem 30's Crips. Penal Code section 186.22, subdivision (b)(1) provides a sentence enhancement for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Further, the trial court carefully balanced the probative value against any potential prejudicial impact, and excluded depictions of guns and limited the number of total photographs admitted. Thus, the evidence was not unduly inflammatory or cumulative. (Evid. Code, § 352.) Finally, even if the trial court abused its discretion in admitting this evidence, it is not reasonably probable the result would have been different if the trial court excluded the photographs. (*People v Watson* (1956) 46 Cal.2d 818, 836.) Evidence of defendant's gang membership was admitted through the testimony of several witnesses.

III. IDENTIFICATION.

Defendant argues that the six-pack photographic array violated his constitutional rights because it was tainted by an unduly suggestive pretrial identification procedure in that he was the only person in the photograph wearing an orange jail jumpsuit. (See *United States v. Wade* (1967) 388 U.S. 218; *People v. Boyer* (2006) 38 Cal.4th 412, 478-479.) He argues his counsel was ineffective on that basis for failing to object to the pretrial identification procedure.

A. Identification Procedures.

"Admission of . . . identification evidence is error only if the identification procedure was unduly suggestive and unnecessary and it is unreliable under the totality of circumstances." (*People v. Kennedy* (2005) 36 Cal.4th 595, 610.) Where any element of the identification process tends to prompt the witness to identify the defendant, the procedure is suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217.) Whether an identification procedure is suggestive depends upon an evaluation of the procedure used and the circumstances under which the identification takes place. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 37-38.) Defendant bears the burden of demonstrating that the

identification procedure was unduly suggestive. (*People v Avila* (2009) 46 Cal.4th 680, 700; *People v. Gonzalez* (2006) 38 Cal.4th 932, 942.)

Here, we have viewed the photographic array, and in spite of defendant's jail garb, there is nothing inherently suggestive in the fact that his photograph was the only one in such attire. One other person is wearing an orange t-shirt; only the top portion of defendant's orange shirt is visible, and it is not obviously a jail jumpsuit; and there are no other features of the array which would prompt a witness to select defendant as the shooter. Further, the record establishes that the witnesses themselves did not find the procedure suggestive. Reitzell testified he did not notice defendant's clothing in choosing the photograph. Reitzell and Farmer identified two persons from the array, each choosing defendant as the most likely person to have been the shooter.

B. Ineffective Assistance of Counsel.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694; see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832-833.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are " virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) Further, "In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous

process of second-guessing.'" (*People v. Pope* (1979) 23 Cal.3d 412, 426, fn. omitted.) Where the record sheds no light on the purpose behind counsel's acts or omissions, the question of ineffective assistance of counsel more appropriately is resolved by a petition for writ of habeas corpus, which permits the opportunity to present additional evidence regarding trial counsel's reasons for acting or omitting to act. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Pope, supra*, 23 Cal.3d at p. 426.)

Here, because the photographic procedure was not unduly suggestive, counsel was not required to object. Furthermore, on the record before us, we cannot determine whether counsel had a tactical reason for not objecting. We find no error.

IV. ACCOMPLICE INSTRUCTION.

Defendant argues that the trial court erred in giving accomplice instructions because it failed to instruct the jury that Johnica Brown was an accomplice as a matter of law; she was charged with the identical offenses as defendant, and pleaded guilty to being an accessory after the fact. Further, he asserts that the court erred in instructing the jury that the testimony of one witness was sufficient because it permitted the jury to find Brown was an accomplice yet convict defendant under the one witness instruction.

A. Factual Background.

The trial court instructed the jury that the testimony of an accomplice should be viewed with caution (CALJIC No. 3.18), the testimony of an accomplice must be corroborated (CALJIC No. 3.11), and that the defense had the burden of proving Brown was an accomplice (CALJIC No. 3.19). The court denied defendant's request that it instruct the jury that Brown was an accomplice as a matter of law, stating that there was a question of Brown's intent and that there was no evidence she knowingly aided and abetted the offenses. The jury was also instructed with CALJIC No. 3.10 (definition of accomplice), CALJIC No. 3.12 (sufficiency of evidence to corroborate an accomplice), CALJIC No. 3.14 (criminal intent necessary for accomplice), and CALJIC No. 2.27 (that the testimony of a single witness was sufficient to convict).

B. Discussion.

Penal Code section 1111 defines an accomplice as a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; *People v. Sully* (1991) 53 Cal.3d 1195, 1227.) In order to be chargeable with the identical offense, the witness must be considered a principal under section 31, which defines principals to include "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (Pen. Code, § 31; *People v. Fauber* (1992) 2 Cal.4th 792, 833.) Whether a person is an accomplice is a question of fact for the jury unless there can be no reasonable dispute as the facts and the inferences to be drawn therefrom. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271-1272.)

Accomplice testimony must be corroborated by other evidence tending to connect the defendant with the commission of the offense. (Pen. Code, § 1111.) Thus, the testimony of an accomplice "has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated." (*People v. Tewksbury* (1976) 15 Cal.3d 953, 967.) Adequate corroboration of an accomplice's testimony need not in itself be sufficient to convict the defendant; it may be slight and entitled to little consideration when standing alone. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Douglas* (1990) 50 Cal.3d 468, 507.) Rather, it must tend "to connect the defendant with the crime so that the jury may be satisfied that the accomplice is telling the truth." (*Id*. at p. 506, fn. omitted.)

Here, the trial court properly refused to instruct that Brown was an accomplice as a matter of law because the record discloses a factual issue whether she promoted, encouraged, or assisted defendant and shared his criminal purpose. (*People v. Sully, supra*, 53 Cal.3d at p. 1227.) Brown never got out of the car or otherwise aided defendant during the shooting; there was no evidence she knew of his intent to shoot the victims.

Furthermore, the giving of the single witness instruction did not mislead the jury. Where the jury is instructed with CALJIC No. 2.27 (testimony of single witness sufficient for proof of any fact) and CALJIC No. 3.11 (accomplice testimony must be corroborated), "we must look to the entire charge, rather than merely one part, to determine whether error occurred." (*People v. Chavez* (1985) 39 Cal.3d 823, 830.) To determine whether error has occurred, we determine whether the jury "is instructed on the kind of evidence necessary to constitute corroboration, on the method of determining whether the accomplice's testimony was corroborated, on viewing an accomplice's testimony with distrust, and the parties proceed[ed] on the premise that corroboration [was] required." (*People v. Andrews* (1989) 49 Cal.3d 200, 217.) In *Andrews,* the court found no error where the jury was also instructed with CALJIC Nos. 3.10 (definition of an accomplice), 3.12 (nature and sufficiency of corroborative evidence), CALJIC No. 3.13 (the rule that one accomplice may not be corroborated by another), CALJIC No. 3.14 (necessity of criminal intent), and CALJIC No. 3.18 (accomplice testimony to be viewed with distrust). *Andrews* found nothing in the combined instructions suggested to the jurors that corroboration of the accomplice's testimony was not required because a reasonable jury would have recognized that No. 2.27 set forth the general rule, and that accomplice testimony was an exception to the general rule. (*People v. Andrews*, *supra,* 49 Cal.3d at p. 217.)

Here, we conclude that given the panoply of instructions on accomplice testimony, no reasonable juror would have been confused by the jury's simultaneous instruction with Nos. 2.27 and 3.11. Furthermore, any error is harmless as there was ample evidence which corroborated Brown's testimony.

V. CUMULATIVE ERROR.

Defendant argues that the cumulative effect of the errors at his trial deprived him of his due process rights to a fair trial. We disagree. In examining a claim of cumulative error, the critical question is whether defendant received a fair trial. (*People v. Cain* (1995) 10 Cal.4th 1, 82.) A predicate to a claim of cumulative error is a finding of error. There can be no cumulative error if the challenged rulings were not erroneous. (*People v.*

Bradford (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].) Our review of the record assures us that defendant received due process and a fair trial. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 1006.)

VI. SENTENCING.

Defendant's sentence imposed 10 years on each count for the gang finding. Penal Code section 186.22, subdivision (b)(1) provides for such an enhancement if a defendant is convicted of a felony committed for the benefit of, at the direction of, or in association with, any criminal street gang (with the specific intent to promote, further, or assist in criminal conduct by gang members). If the felony is a violent felony, the enhancement is an additional 10 years in state prison. (Pen. Code, § 186.22, subd. (b)(1)(C).) However, if the defendant is convicted of a felony punishable by life imprisonment, there is an alternative sentencing provision: a 15-year minimum parole eligibility term. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1007.)

Here, defendant's sentence is unauthorized. "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) An unauthorized sentence may be corrected even when there was no objection in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) We therefore modify defendant's sentence to strike the 10-year sentence enhancements imposed pursuant to section 186.22, subdivision (b)(1)(C) on counts 1 through 4. The abstract of judgment shall be modified to reflect a minimum parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5) on counts 1 through 4.

DISPOSITION

The 10-year sentence enhancements imposed pursuant to section 186.22, subdivision (b)(1)(C) on counts 1 through 4 are stricken. The abstract of judgment shall be modified to reflect a minimum parole eligibility of 15 years pursuant to section 186.22, subdivision (b)(5) on counts 1 through 4. The modified abstract shall be

forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.